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No. 83-18

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

DUN & BRADSTREET, INC.,
Petitioner,

v.

GREENMOSS BUILDERS, INC.,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Vermont

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BRIEF OF THE WASHINGTON POST, AMICUS CURIAE, IN SUPPORT OF REVERSAL

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The Washington Post submits this brief as *amicus curiae* in support of petitioner's claim that the presumed and punitive damage awards against it violate the First and Fourteenth Amendments to the Constitution. All parties to this action have given their written consent to the filing of this brief pursuant to Rule 36.2 of the Rules of this Court. Copies of the letters of consent have been filed with the clerk.

INTEREST OF THE AMICUS

Amicus curiae, The Washington Post, publishes a newspaper of general circulation in the Washington, D.C. metropolitan area.[1] It has been, and is, involved in a number of libel cases in which punitive and presumed damages are sought, and one case in which a plaintiff's verdict (including punitive damages) was returned. (The trial judge entered judgment notwithstanding the verdict in the Post's favor, and the case is on appeal. See p. 14, *infra*.) Because of its involvement in libel litigation in which punitive and presumed damages are sought, the Post has an interest in the development of the legal principles governing such claims.

SUMMARY OF ARGUMENT

Both the Vermont Supreme Court and the petitioner in this case have assumed that punitive and presumed damages may be awarded against the press upon a showing of "actual malice" under *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and proceeded to pose the question whether nonmedia defendants are entitled to the same protection. In fact, neither *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), nor any other decision of this Court, estab-

[1] The Post is a division of the Washington Post Company, which has the following subsidiaries or affiliates (excluding wholly owned subsidiaries): Bowater Mersey Company Ltd., Robinson Terminal Warehouse Corp., Los Angeles Times-Washington Post News Service, International Herald Tribune, S.A., Bear Island Paper Company (a limited partnership), The Detroit Cellular Telephone Company (a general partnership), and The Washington-Baltimore Cellular Telephone Company (a general partnership). This disclosure is made pursuant to Rule 28.1 of the Rules of this Court.

lishes a firm rule for punitive or presumed damages against the press. *Gertz* did not hold, or state by way of dictum, that punitive or presumed damages may be awarded against any defendant upon a showing of actual malice. Indeed, there was no separate punitive damage award at all in *Gertz*, and the case presented no occasion for the Court to decide whether punitive damages may ever be awarded against the press or any other defendant.

Gertz, in short, left open the question whether punitive or presumed damages may ever be awarded in a defamation case against the press or against a member of the public. The issue in this case, then, is not simply whether there is a basis for distinguishing between media and nonmedia defendants. The issue is whether Dun & Bradstreet, a company that published certain financial and credit information about another company, is entitled to the minimum protection it has asked for—namely, the requirement that actual malice be shown before punitive and presumed damages are awarded against it. *Amicus* agrees that to deny Dun & Bradstreet that minimum protection, and to uphold punitive damages on the facts of this case, would violate the First Amendment.

Dun & Bradstreet has not asked for protection beyond the actual malice standard, and there is therefore no occasion for the Court to consider whether, and under what circumstances, additional protection may be appropriate. It is *amicus*' position, however, that in an appropriate case this Court should hold that punitive and presumed damages may never be awarded in a defamation action. Punitive damages generally, and the unique remedy of presumed damages in defamation cases, are anomalies of the law. Committed largely to the uncontrolled discretion of

juries, these awards often bear no relationship to actual harm done. They can be used to punish unpopular defendants; they encourage unnecessary litigation; and they chill desirable as well as undesirable conduct.

In *Gertz* the Court expressly recognized that these concerns have special force in defamation cases. The Court stated further that the states have "no substantial interest in securing for [defamation] plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." 418 U.S. at 349. The logic of *Gertz* and of the First Amendment itself points ineluctably to the conclusion that punitive and presumed damages may never be awarded in defamation cases.

Recent judicial experience with punitive damages in defamation cases underscores the appropriateness of such a ruling. Massive punitive damage awards of over a million dollars have become commonplace. The fear of these devastating verdicts has chilled the exercise of First Amendment freedoms and threatened the very existence of media outlets ill-equipped to absorb them.

This case does not require the Court to decide whether punitive or presumed damages may ever be awarded against a media or nonmedia defendant, nor does it require the Court to decide whether there are some categories of cases in which punitive damages are inappropriate. The Court need only decide whether Dun & Bradstreet is entitled to the minimum protection it has sought in the case—the actual malice standard. The Court should decide that question in the affirmative, and leave the remaining questions concerning punitive and presumed damages to a case in which they are squarely presented and fully briefed.

ARGUMENT

I. *GERTZ* v. *ROBERT WELCH, INC.* LEFT OPEN THE QUESTION WHETHER PUNITIVE AND PRESUMED DAMAGES MAY BE AWARDED IN A DEFAMATION CASE

The Vermont Supreme Court saw the "critical issue" in this case as whether the "qualified protections afforded the media in 'private' defamation actions, as set forth in *Gertz*, [should] be extended to actions involving nonmedia defendants." J. App. 37. Likewise, the petitioner has framed the issue before the Court as "whether the First Amendment's limitations on the award of presumed and punitive damages for libel, first enunciated in *Gertz* v. *Robert Welch, Inc.*, . . . apply to 'nonmedia' defendants." Petition i. This framing of the issue is inadequate. It supposes that the Court has already "enunciated" a rule for media defendants, and that the only remaining question is whether nonmedia defendants are entitled to the same rule. There is no settled rule, however: *Gertz* did not resolve the question whether punitive or presumed damages may ever be awarded against a media defendant. This case therefore cannot be decided simply by asking whether there is a basis for distinguishing between media and nonmedia defendants.

Gertz did not hold that presumed and punitive damages may be awarded against a media defendant in favor of a private libel plaintiff upon a showing of actual malice—that is, knowledge of falsity or reckless disregard for the truth. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 280 (1964). Nor did the Court in *Gertz* make that pronouncement by way of dictum. It noted only that presumed and punitive damages *cannot* be recovered by a private libel plaintiff when the private plaintiff has *not* even shown

actual malice under *New York Times*: "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." 418 U.S. at 349. That is all the Court had to decide to resolve the damage issue in *Gertz*, for the district court and court of appeals agreed there was no showing of actual malice in *Gertz*, and this Court did not disturb that finding. Whether a private (or public) figure libel plaintiff can recover presumed or punitive damages when actual malice *is* proven is a question that was not before the Court in *Gertz* and which properly was not decided.

Although many lower courts have found in *Gertz*'s double negative the implication that punitive damages are permitted upon a showing of actual malice, they recognize that the Court has left this question open. *See, e.g., Maheu* v. *Hughes Tool Co.*, 569 F.2d 459, 478 (9th Cir. 1978); *Buckley* v. *Littell*, 539 F.2d 822, 897 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *Davis* v. *Schuchat*, 510 F.2d 731 (D.C. Cir. 1975); *Restatement (Second) of Torts* § 621, comment d (1977). This Court itself seems implicitly to have acknowledged that the question remains open, at least with respect to public figure plaintiffs, when in *Smith* v. *Wade*, —— U.S. ——, 103 S.Ct. 1625, 1639 n.19 (1983), it declined to "intimate [a] view on any First Amendment issues" raised by such opinions.

Gertz would hardly have been an appropriate case in which to resolve all issues pertaining to punitive and presumed damages in defamation cases. The parties did not brief the issue of punitive or presumed damages, and there was no separate award of punitive damages in the case.

In *Gertz*, the Court rejected the view of the plurality in *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971), that even a private figure must show actual malice in challenging a publication on a matter of public interest. A private individual, the Court held, is required by the Constitution only to prove fault by the publisher. That decided the basic issue before the Court, but the Court did not stop there. It recognized that the logic of its decision, while dictating a lower standard of liability for private figures, also required limitations on the types of damages recoverable in libel actions—specifically, presumed damages and punitive damages. The Court opted for a less rigorous standard of liability for private individuals "in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation." 418 U.S. at 348-49. The Court added, however:

> But this countervailing state interest extends no further than compensation for actual injury. For the reasons stated below, we hold that the States may not permit recovery of presumed or punitive damages, *at least* when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

Id. at 349 (emphasis added).

The Court was careful not to state that presumed and punitive damages may be recovered when liability is based on a showing of actual malice; it simply stated that *at least* when, as in *Gertz*, there is no proof of actual malice, there can be no presumed or punitive damages. The Court, in short, cautioned that the rationale for permitting the recovery of actual damages upon a showing of fault did not extend

to the recovery of presumed and punitive damages. But the Court did not purport to define what circumstances, if any, would warrant the imposition of presumed or punitive damages.

While *Gertz* cannot be read to resolve the question whether punitive and presumed damages may be recovered, the reasoning of the Court's opinion suggests strongly that punitive and presumed damages should never be awarded. On the subject of presumed damages, the Court said:

> The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.

418 U.S. at 349.

The Court's concern about the impact of punitive damages upon freedom of expression was made equally clear:

> We also find no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined standards of liability for defamation. In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the State interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.

418 U.S. at 350.

The dangers of presumed and punitive damages could not have been stated more clearly. Both inhibit the vigorous exercise of First Amendment freedoms by permitting recovery of massive damage awards unrelated to actual injury. Both invite juries to punish unpopular speakers and the expression of unpopular views. Indeed, punitive damages in defamation cases are expressly designed to punish the exercise of free speech. There is certainly a serious question whether damage awards fraught with these dangers can be squared with the Constitutional guarantees of free speech and free press.

II. PUNITIVE AND PRESUMED DAMAGES FOR DEFAMATION VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS

Punitive damages are a disfavored anomaly in any context. They are unfaithful to the "fundamental premise of our legal system . . . that damages are awarded to *compensate* the victim." *Smith* v. *Wade*,

103 S.Ct. at 1641 (Rehnquist, J., dissenting). They can be used to punish unpopular defendants. *Id.*; *see Electrical Workers* v. *Foust*, 442 U.S. 42, 50-51 n.14 (1979). Because they are unpredictable and often enormous, they encourage unnecessary litigation as a means to gratuitous jackpots. And the threat of expensive litigation and arbitrary awards can chill not only undesirable but also "desirable conduct." *Smith* v. *Wade*, 103 S.Ct. at 1642 (Rehnquist, J., dissenting).

These concerns have special force in the area of free speech. It is a keystone of First Amendment jurisprudence that speech must not be "chilled" because of our "profound national commitment to . . . uninhibited, robust, and wide-open" debate. *New York Times Co.* v. *Sullivan*, 376 U.S. at 270. Yet the very purpose, and the undeniable effect, of punitive damage awards in defamation cases is to punish and deter speech. Punitive damages and the First Amendment are thus fundamentally at cross-purposes.

It is no answer to this conflict to say that punitive damage awards will deter only unprotected speech: "any system that punishes certain speech is likely to induce self-censorship by those who would otherwise exercise their Constitutional freedom." *Rosenbloom* v. *Metromedia*, 403 U.S. at 64-65 (Harlan, J., dissenting). Those with lawful messages to convey "steer far wider of the unlawful zone" because the magnitude of the penalty attached to unprotected speech is so uncertain and potentially so great. *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958); *see Rosenbloom*, 403 U.S. at 82 (Marshall, J., dissenting) ("the size of the potential judgment that may be rendered against the press must be the most significant factor in producing self-censorship"). In awarding

punitive damages, courts necessarily endorse the chilling of First Amendment liberties.

As noted above, this Court in *Gertz* expressly recognized the chilling effect of punitive and presumed damage awards in defamation cases. See pp. 8-9, *supra*. And *Gertz* is only the most recent of a number of opinions in which the Justices of this Court have noted that these awards are constitutionally suspect. In *New York Times Co.* v. *Sullivan*, the Court commented that "the pall of fear and timidity imposed [by large damage awards] . . . is an atmosphere in which the First Amendment freedoms cannot survive." 376 U.S. at 278. Justice Black wrote in concurrence that "huge verdicts . . . threaten the very existence" of a virile press. *Id.* at 294. In *Rosenbloom*, Justice Harlan abandoned his earlier conclusion in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967) (plurality opinion), that the First Amendment does not in any way limit punitive damages. With the cautionary remark that "matters are in flux," 403 U.S. at 72 n.3, Justice Harlan wrote that he now thought the Constitution imposed "*at a minimum*" two limits on punitive damage awards: there must be proof that "the speaker acted out of express malice," and punitive awards must "bear a reasonable and purposeful relationship to the actual harm done." *Id.* at 73, 77 (dissenting opinion; majority did not address question of punitive damages) (emphasis added). Justice Marshall and Justice Stewart concluded in *Rosenbloom* that any award of punitive or presumed damages in a defamation case is unconstitutional, because "the fear of the extensive awards that may be given . . . must necessarily produce the impingement on freedom of the press rec-

ognized in *New York Times.*" *Id.* at 83 (dissenting opinion).

Justices Marshall and Stewart later joined the Court's opinion in *Gertz.* Indeed, the votes of these two Justices, who had previously rejected punitive and presumed damages altogether, were essential to the majority in *Gertz.* The opinion they joined does not contradict their earlier views. The Court's statements in *Gertz* are no more than tentatively worded dicta which "leave open the possibility that punitive damages may in time be found too intimidating to free expression to be allowed at all." Lewis, New York Times v. Sullivan *Reconsidered: Time To Return to "The Central Meaning Of The First Amendment"*, 83 Colum. L. Rev. 603, 617 (1983).

Justice Harlan, noting that the law with respect to punitive damages is "in flux," emphasized twice in *Rosenbloom* the importance of "further judicial experience in this area" before any authoritative rule could be stated. 403 U.S. at 74, 77. By now the lessons of experience are clear: in the past few years, the fear that punitive damage awards could be used to censor the press has become a reality. When *Gertz* was decided in 1974, massive damage awards against the press were virtually unheard of. Today, they have become commonplace.

- In April 1979 a jury returned a verdict of $4.5 million, including $1.5 million in punitive damages, against the *San Francisco Examiner* and its reporters. The plaintiffs, two policemen and a prosecutor, had complained of a series of articles describing their role in securing the conviction of a youth on a murder charge. *McCoy* v. *The Hearst Corp.*, Civ. No. 49915 (Cal. Ct. App., 1st App. Dist., Div. 4). An appeal is pending.

- In May 1980 a jury awarded a county sheriff $200,000 in compensatory damages and $500,000 in punitive damages against a small local newspaper, the *Ann Arbor News*, based on articles which accused the sheriff of improprieties including death threats against one of his deputies, brutality against private citizens, and the misappropriation of public funds. The verdict was reversed on appeal on the ground that the evidence could not support a finding of actual malice. *Postill* v. *Booth Newspapers*, 325 N.W.2d 511 (Mich. App. 1982).

- In June 1980 *The Alton* (Illinois) *Telegraph*, a respected publication with a circulation of 38,000 and net worth of about $3 million, was ordered to pay $9.2 million, including $2.5 million in punitive damages, to a local builder because two of its reporters had written a memorandum to a U.S. Justice Department investigator passing on a tip that the builder was receiving money from the Mafia in the form of bank loans. *Green* v. *Alton Telegraph Printing Co.*, 107 Ill. App. 755, 438 N.E.2d 203 (1982).

- In February 1981 a federal court jury in Wyoming awarded the astounding sum of $26.5 million—$1.5 million in compensatory damages and $25 million in punitive damages—to a former beauty pageant winner who complained she was defamed by a fictional article in *Penthouse* magazine. This judgment was reduced by the trial court to $14 million, and reversed by the Court of Appeals on the ground that *Penthouse's* fictional article could not reasonably be understood as describing any actual facts about the plaintiff. *Pring* v. *Penthouse, International, Ltd.*, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, —— U.S. ——, 103 S.Ct. 3112 (1983).

• In March 1981 a California jury awarded $300,000 in compensatory damages and $1.3 million in punitives to Carol Burnett, who complained that the *National Enquirer* falsely reported she had engaged in loud and boisterous behavior in a Washington, D.C. restaurant. *Burnett* v. *National Enquirer, Inc.*, 7 Media L. Rep. [BNA] 1321 (Cal. Super. 1981). The verdict was remitted by the trial court to $800,000 and reduced on appeal to $200,000. *Burnett* v. *National Enquirer, Inc.*, 144 Cal.App.3d 991, 193 Cal. Rptr. 205 (1983). A further appeal is pending.

• A Texas jury returned a verdict of $1 million in compensatory damages and $1 million in punitive damages against the publisher of the *Dallas Morning News* in a case brought by a benefactor of a state university who was involved in a controversy over the firing of several faculty members and the resignation of the president. The plaintiff had alleged that his comments on the controversy were falsely characterized as threats against university officials. The judgment was reversed by a court of appeals on the ground that the allegedly defamatory statements were either true or protected statements of opinion, and on the further ground that there was no evidence of actual malice. *A. H. Belo Corp.* v. *Rayzor*, 644 S.W.2d 71 (Tex. App. 1982).

• In July 1982 a *Washington Post* story that Mobil President William Tavoulareas had "set up" his son in a ship management firm resulted in a $2 million jury verdict, including $1.8 million in punitive damages, against the Post. Judgment notwithstanding the verdict was subsequently entered in the Post's favor on the ground that there was no evidence of actual malice.

Tavoulareas v. *The Washington Post Company*, 567 F. Supp. 651 (D.D.C. 1983). Plaintiff's appeal is pending.

• A verdict of zero compensatory damages and $2.5 million punitive damages was entered against an author and publisher whose book mistakenly asserted that the plaintiff had been indicted three times for the unauthorized practice of optometry. The author had confused plaintiff with his brother. *Rogers* v. *Doubleday*, 644 S.W. 2d 833 (Tex. App. 1982). The case is on appeal before the Texas Supreme Court.

• In May 1983 a judge entered a verdict of $2 million in compensatory damages and $5 million in punitive damages in favor of an Atlantic City hotel owner who claimed that an article in *Philadelphia Magazine* falsely characterized him as a drug dealer. *Edghill* v. *Municipal Publications, Inc.*, No. 2371 (Pa. Ct. Common Pleas, May Term 1972). Defendant's motion to recuse the trial judge is pending on appeal.

• In June 1983 a jury awarded $4.5 million, including $3 million in punitive damages, to a former Philadelphia district attorney, Richard Sprague, for an article in the *Philadelphia Inquirer* raising questions about the propriety of Sprague's participation in a homicide case involving the son of his close friend, a former state police commissioner. *Sprague* v. *Walter*, No. 3644 (Pa. Ct. Common Pleas, April Term 1973). The *Inquirer's* motion for a new trial is pending.

• In September 1983 a Texas jury awarded $600,000 in compensatory damages and $1 million in punitive damages against a television station which reported that a company in the business of armorplating civilian vehicles for

sale principally in Central America was under investigation by the Bureau of Alcohol, Tobacco, and Firearms for smuggling guns. *International Security Group, Inc.* v. *The Outlet Co.*, No. 79-CI-10293 (Dist. Ct., 224th Jud. Dist., Bexar Co.).

• Recently, a federal court jury in Colorado awarded $3.8 million in presumed damages to a company whose sales and employees were understated in a financial report prepared by the petitioner in this case, Dun & Bradstreet. *Sunward Corp.* v. *Dun & Bradstreet, Inc.*, Civil Action No. 82-K-147 (D. Colo.).

To be sure, many of these awards are reduced or set aside entirely by the trial court or the court of appeals. But that does not mitigate their chilling effect. Indeed, the high rate with which these huge awards are set aside bears out the view that juries award punitive damages to punish unpopular views or publications, with indifference to the values of free speech and free press, and disregard for even the minimum requirements of the law.

One case dramatically illustrates that the prospect of securing a reversal or reduction in a punitive damage award is small comfort to a small newspaper faced with a huge jury verdict. The $9.2 million judgment against *The Alton Telegraph* forced the newspaper into bankruptcy and compelled it to settle the case before the appeal it had prepared could be heard. That appeal may well have been meritorious: it raised the issues whether the complaint, filed seven years after the allegedly defamatory memorandum was sent, was barred by the statute of limitations; whether the memorandum was the legal cause of the plaintiff's alleged damages; and whether the memorandum, which had been sent to the Justice Department, was protected by the qualified common law privilege to report allegations of wrongdoing to law enforcement officials. Although these arguments may well have prevailed on appeal, the *Telegraph* simply could not afford to pursue them, and chose instead to settle the case for $1.4 million in order to save itself from extinction. "How Libel Suit Sapped the Crusading Spirit of a Small Newspaper," *The Wall Street Journal*, September 29, 1983, at 1.

Today, *The Alton Telegraph* still feels the chilling effect of its libel judgment. Its editor, publisher and partial owner, Steven A. Cousley, told a *Wall Street Journal* reporter:

> We are like a tight end who hears footsteps everytime he runs to catch a pass. . . . Wouldn't you be gun-shy if you nearly lost your livelihood and your home?

Id. According to *The Wall Street Journal* story, the *Alton Telegraph*

> appears to be shying away from important stories. When someone called recently with a tip about misconduct in a sheriff's office, Steven Cousley decided against investigating. 'Let someone else stick their neck out this time,' a reporter heard him tell an editor. (Asked about the remark, Mr. Cousley says, 'I probably said that.')

Id. at 22.

The huge damage awards that juries have returned in recent defamation cases have unquestionably discouraged the "uninhibited, robust, and wide-open" inquiry and debate that *New York Times Co.* v. *Sullivan* was intended to foster. 376 U.S. at 270. These awards can threaten the very existence of some publications, and they dampen the enthusiasm and vigor of all.

> Whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive.

Id. at 278.

Particularly in the light of experience in recent years, the question must be posed: what legitimate state interest can justify punitive and presumed damages awards that have the undeniable effect, and in the case of punitives the express purpose, of chilling freedom of speech and of the press? On this point the language of *Gertz* is unequivocal. The states have "*no* substantial interest in securing for [defamation] plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." 418 U.S. at 349 (emphasis added). The only "legitimate State interest" in authorizing juries to award damages for defamation is "the compensation of individuals." *Id.* at 341. *See also id.* at 348-49; *Rosenbloom*, 403 U.S. at 66 (Harlan, J. dissenting) ("the legitimate function of libel law must be understood as that of compensating individuals for actual, measurable harm"); *Curtis Publishing Co.* v. *Butts*, 388 U.S. at 153. And punitive damages are "wholly irrelevant" to that state interest. *Gertz*, 418 U.S. at 350.

Because of the impact on protected speech of any remedy for unprotected speech, state remedies "must reach no farther than is necessary to protect the legitimate interest involved." *Gertz*, 418 U.S. at 349; *see Keyishian* v. *Board of Regents*, 385 U.S. 589, 602-04 (1967). It is plain, indeed tautological, that permitting recovery of proven actual damages adequately protects the state's legitimate interest in compensation. Punitive and presumed damages are unnecessary to protect that interest and are therefore unconstitutional.

Even if the deterrence of unprotected speech were a "legitimate function of libel law," *Rosenbloom*, 403 U.S. at 66 (Harlan, J., dissenting)—and no opinion of this Court suggests that it is—unprotected defamatory speech is effectively and sufficiently deterred by "the very possibility of having to engage in litigation, an expensive and protracted process," *Rosenbloom*, 403 U.S. at 52, and by the threat of compensatory damage awards. Thus in *Sprouse* v. *Clay Communications, Inc.*, 211 S.E. 2d 674, 692 (W. Va.), *cert. denied*, 423 U.S. 882 (1975), the West Virginia Supreme Court of Appeals rejected punitive damages on the ground that actual damages were "adequate for the purpose of dissuading publishers from similar willful and reckless conduct in the future." *See also Maheu* v. *Hughes Tool Co.*, 384 F.Supp. 166, 170-71 (C.D.Cal. 1974), *rev'd in part and aff'd in part*, 569 F.2d 459 (9th Cir. 1978). Assuming, *arguendo*, that there could be a legitimate state interest in providing an additional measure of punishment or deterrence in some cases, the present system of punitive damage awards is intolerable because punitive damages, "limited only by the gentle rule that they not be excessive," *Gertz*, 418 U.S. at 350, are not narrowly tailored to promoting that interest. *See, e.g., Keyishian* v. *Board of Regents*, 385 U.S. at 602-04. Punitive damages are unpredictable in amount and often disproportionate to any harm actually done or reasonably foreseen. The largely uncontrolled discretion of juries to award punitive damages itself renders them unsuitable instruments to control unprotected speech, because the terror they inspire chills protected speech as well.

In the final analysis, damage awards whose very purpose is to punish speech have no place in a system that values and protects freedom of speech—and punitive and presumed damage awards which threaten the vigor and, in some cases, the very existence of the press, cannot be reconciled with a system that values and protects freedom of the press. Punitive and presumed damages, in short, cannot be squared with the First Amendment.[2]

III. THE JUDGMENT IN THIS CASE SHOULD BE REVERSED ON THE GROUND THAT DUN & BRADSTREET IS ENTITLED TO THE MINIMUM PROTECTION IT HAS ASKED FOR

There are, *amicus* submits, a number of open questions concerning the availability of punitive and pre-

[2] Three states have held that the First and Fourteenth Amendments bar punitive damages for libel plaintiffs who recover adequate compensatory damages. *Sprouse* v. *Clay Communications, Inc.*, 211 S.E.2d at 692; *McHale* v. *Lake Charles American Press*, 390 So.2d 556 (La. App. 1980), *cert. denied*, 452 U.S. 941 (1981); *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 859-60, 330 N.E.2d 161, 169 (1975). The Supreme Judicial Court of Massachusetts rested its holding on both state and federal constitutional grounds:

> We reject the allowance of punitive damages in this Commonwealth in any defamation action, on any state of proof, whether based on negligence, or reckless or wilful conduct. We so hold in recognition that the possibility of excessive and unbridled jury verdicts, grounded on punitive assessments, may impermissibly chill the exercise of First Amendment rights by promoting apprehensive self-censorship.

367 Mass. at 859-60, 330 N.E.2d at 169.

At least two states have held that punitive damages in libel cases are barred by the free speech and free press guarantees of their own constitutions. *Hall* v. *May Department Stores*, 292 Or. 131, 637 P.2d 126 (1981); *Tasket* v. *KING Broadcasting Co.*, 86 Wash. 2d 439, 546 P.2d 81 (1976).

sumed damages in libel cases, but they need not and should not all be resolved in this case. As the foregoing discussion demonstrates, there is a serious question whether punitive and presumed damages should ever be allowed in a defamation case. If they were to be approved under any circumstances, there would certainly arise the troubling question whether they should ever be permitted against speech that touches upon public affairs or matters of public interest.[3]

[3] This Court has often said that speech concerning public affairs and public issues is at the core of the First Amendment's protection. *See, e.g., Mills* v. *Alabama*, 384 U.S. 214, 218 (1966) ("a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs"); *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."); *New York Times Co.* v. *Sullivan*, 376 U.S. at 270 ("debate on public issues should be uninhibited, robust, and wide-open"). And the Court has emphasized that "[f]reedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (1940). In *Rosenbloom* v. *Metromedia*, a plurality of this Court concluded that publications on matters of public interest and concern should receive the benefit of the *New York Times* standard for recovery of compensatory damages. The Court rejected that view in *Gertz*, because it abridged to an unacceptable degree the state's interest in providing "a legal remedy for defamatory falsehood injurious to the reputation of a private individual." 418 U.S. at 346. But that interest in compensating individuals who are defamed cannot justify an award of punitive damages. Nor can any state interest justify a damage award intended to punish speech on a matter of public interest and concern.

In *Gertz* the Court expressed concern about calling upon judges to determine "which publications address issues of

There may be a question, as the Petition for Certiorari puts it, whether there is a basis for distinguishing between the press and the rest of the public when it comes to punitive damages.[4] There may also be a question whether, if punitive damages were to be allowed, proof in addition to knowledge of falsity or

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'general or public interest' and which do not." 418 U.S. at 346. The line may be difficult (and in some contexts dangerous) to draw, and that difficulty may be an additional reason to prohibit punitive damages altogether.

[4] As this Court recently emphasized, the explicit guarantee of freedom of the press was important to the Framers. *Minneapolis Star* v. *Minnesota Commissioner of Revenue*, —— U.S. ——, 103 S. Ct. 1365, 1371 (1983). In that case and many others, the Court has emphasized the special role that the press plays in informing the public and guaranteeing that government is responsive to the public's will. *See, e.g., Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 840 (1978); *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 491-92 (1975); *Mills* v. *Alabama*, 384 U.S. at 219; *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936). That is not to say that members of the public, who enjoy the protection of the free speech provision of the First Amendment, should not enjoy full protection against punitive and presumed damage awards for defamation. Certainly there could be no basis for distinguishing between the established press and the lonely pamphleteer in defining the media for purposes of defamation law. Moreover, any line between media and nonmedia defendants in defamation cases would be a troubling and potentially mischievous one, which could effectively limit the diversity of viewpoints and information available to the public. Dun & Bradstreet apparently does not argue for media status, but as its own information business illustrates, information that is of insufficient general interest to warrant publication in the mass media may still be of vital importance to a small ment of the public.

reckless disregard for the truth should be required—namely, ill will, spite or hatred.[5]

The Court need not resolve these issues in this case. Dun & Bradstreet, a company that published certain financial and credit information about another company, seeks the protection of the actual malice standard to the extent that punitive and presumed damages are at issue. Surely it is entitled to no less protection than that, and the Court should so hold. Punitive

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[5] In *Smith* v. *Wade*, the Court expressly declined to intimate any view on the First Amendment issues raised by decisions permitting punitive damage awards in favor of a public official or public figure upon the showing of actual malice required for the recovery of compensatory damages. 103 S. Ct. at 1639 n.19. In his *Rosenbloom* dissent, Justice Harlan expressed the view that punitive damages should not be permitted unless "the plaintiff has proved that the speaker acted out of *express malice*." 403 U.S. at 77 (emphasis added). Such proof—that the speaker was motivated by ill will or personal animus—is quite different from proof of "actual malice" under *New York Times*. *See, e.g., Letter Carriers* v. *Austin*, 418 U.S. 264, 281-82 (1974); *Greenbelt Cooperative Publishing Ass'n* v. *Bresler*, 398 U.S. 6 (1970); *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81, 82 (1967); *Rosenblatt* v. *Baer*, 383 U.S. 75, 84 (1966); *Henry* v. *Collins*, 380 U.S. 356 (1965). Requiring such proof of bad motive would comport with "the common-law standard of 'malice' generally required under state tort law to support an award of punitive damages." *Cantrell* v. *Forest City Publishing Co.*, 419 U.S. 245, 252 (1974), and might provide some additional protection against unwarranted punitive damage awards. Two states have held that punitive damages are barred by their constitutions unless there is proof that the publisher acted with actual hatred or ill will. *AAFCO Heating & Air Conditioning Co.* v. *Northwest Publications, Inc.*, 162 Ind. App. 671, 321 N.E.2d 580 (1974), *cert. denied*, 424 U.S. 913 (1976); *Walker* v. *Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P.2d 450, *cert. denied*, 423 U.S. 1025 (1975).

damages for defamatory falsehoods should never be permitted upon facts of the sort deemed sufficient by the Vermont Supreme Court in this case—that Dun & Bradstreet's employee "inadvertently" mistook the bankruptcy of a former Greenmoss employee for the bankruptcy of Greenmoss itself, and that Dun & Bradstreet failed to adhere to its routine practice of prepublication verification. J. App. 35. That may be evidence of negligence, but not evidence that warrants the imposition of punitive damages under any standard compatible with the First Amendment. The Court should hold that Dun & Bradstreet is *at least* entitled to the minimum protection against punitive and presumed damages it has asked for—namely, the actual malice standard of *New York Times*—and it should leave the remaining questions concerning punitive and presumed damages to a case in which they are squarely presented and fully briefed.

IV. CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Vermont should be reversed.

Respectfully submitted,

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